MOTION FILED
DEC 1 1994

No. 94-810

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROY B. TAYLOR SALES, INC.,
Petitioner,
v.
HOLLYMATIC CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE INDEPENDENT DISTRIBUTORS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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16 pp

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Your amicus respectfully requests leave to file the attached brief on behalf of the Independent Distributors Association in support of the Petition for Certiorari of Roy B. Taylor Sales, Inc. Petitioner has consented to the filing of this brief. A copy of Petitioner's letter of consent has been filed with the Clerk of this Court. Respondent has declined to consent to the filing of this brief.

The Independent Distributors Association ("IDA") requests that this Court consider its brief in this matter as a representative of over 400 independent manufacturers, sellers or wholesale distributors of construction equipment replacement parts.

Your amicus is familiar with the questions involved and the scope of their presentation and believes additional

argument is necessary on the issue of whether the United States Court of Appeals for the Fifth Circuit created an improper exception to the "per se" rule of illegality established by this Court in antitrust tying cases, thereby removing any practical remedy that dealers subjected to tie-ins could obtain under federal antitrust laws. The attached brief presents additional authorities and arguments to assist this Court in reviewing the issues contained in the Petition for Certiorari.

Because of the important issues of federal antitrust law presented in this case and the need for this Court to reaffirm the per se rule of illegality in antitrust tying cases, your amicus respectfully requests that this Court grant the Motion for Leave to File the attached Brief *Amicus Curiae*.

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BRIEF AMICUS CURIAE OF THE INDEPENDENT DISTRIBUTORS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The Independent Distributors Association submits this Brief *Amicus Curiae* in support of the Petition for Certiorari filed by Roy B. Taylor Sales, Inc.

INTERESTS OF THE AMICUS

The Independent Distributors Association ("IDA") requests that this Court consider its brief in this matter as a representative of over 400 independent manufacturers, sellers or wholesale distributors of construction equipment replacement parts.

In the manufacture of bulldozers and other heavy earth-moving and construction equipment, ever-increasing numbers of components are not actually manufactured by the machine manufacturers, but are purchased from outside suppliers. Members of the IDA are independent manufacturers, suppliers, and sellers of these types of machine components. The component parts generally are sold to and through heavy equipment manufacturers and IDA members.

Caterpillar Inc. occupies a dominant market position in the multi-billion dollar construction equipment industry, both in the number of new machines sold and total sales dollars. With respect to dealers of Caterpillar equipment, your amicus submits, Caterpillar ties the sale of its heavy equipment to sales of component parts that are used in the equipment. The IDA and its members, consequently, have a keen interest in decisions made by federal courts relating to tying arrangements.

The IDA believes that the decision of the Fifth Circuit Court of Appeals in *Roy B. Taylor Sales, Inc. v. Hollymatic Corporation,* 28 F.3d 1379 (5th Cir. 1994) could result in an application of the antitrust laws that would significantly narrow the protection that members of the IDA now enjoy from anticompetitive conduct in which major manufacturers are, or may in the future be, engaged.

Your amicus appreciates the opportunity to present these views, and respectfully requests that this Court grant the Petition for Certiorari.

SUMMARY OF ARGUMENT

The Fifth Circuit Court of Appeals incorrectly applied a Rule of Reason standard in the *Hollymatic* case, instead of the applicable per se rule of illegality set forth by this Court in previous tying cases. As a result, the court of appeals required proof that Respondent's tying arrangement with Petitioner dealer had anticompetitive

effects upon down-market consumers. This requirement clearly is at odds with the proper rule enunciated by this Court.

Further, the decision of the Fifth Circuit Court of Appeals fails to provide dealers with the same protections under the federal antitrust laws that are afforded to end-users, despite the fact that protection of dealers was one of the purposes for enacting the specific antitrust laws that are at issue in this case.

The result of the court of appeals' decision is a dramatic narrowing of the commercial circumstances to which the federal antitrust laws will apply. Under this decision, elimination of competition for sale of the tied product and resultant supercompetitive prices to the dealer are not competitive injury. Absent proof of competitive injury to end-users, dealers injured by illegal tying arrangements have no recourse under the antitrust laws. The Fifth Circuit Court of Appeals' requirement that dealers subject to tying arrangements meet an unreasonable burden of proving anticompetitive effect upon end-users will have a chilling effect upon private enforcement of the antitrust laws.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN ADOPTING A RULE OF REASON STANDARD IN LIEU OF A PER SE RULE OF ILLEGALITY WITH RESPECT TO DEALERS

A. Definition of a Tying Arrangement

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agree that the party will not purchase that product from any other supplier. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958). Tying arrangements "generally serve no legitimate business purpose that cannot be achieved in some less restrictive way" and "serve hardly any purpose beyond the suppression of competition." *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969); *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949). Therefore, tying arrangements are per se unlawful. *Northern Pac.*, 356 U.S. at 3.

B. Standard of Proof

Under the prevailing standard, which was reaffirmed in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), and recently in *Eastman Kodak Co. v. Technical Services, Inc.*, 504 U.S. ——, 119 L.Ed.2d 265 (1992),[1] a plaintiff seeking relief under the antitrust statutes, including the Sherman Act and the Clayton Act, as a result of a tying arrangement must prove that (1) the seller conditioned sale of its tying product on the buyer's purchase of the tied product; (2) the tying and tied products are separate and distinct products; (3) the seller possesses sufficient economic power in the market

[1] It was noted in *Kodak* that, despite arguments to the contrary, the Court has not altered significantly the per se tying doctrine over the years. *Kodak*, 119 L.Ed.2d at 296-97 (Scalia, J. dissenting).

for the tying product to appreciably restrain competition in the tied product; and (4) a not insubstantial amount of commerce in the tied product is foreclosed by the tying. *See, e.g., Jefferson Parish*, 466 U.S. at 9, 12-18.

This Court's precedents specifically state that, because of the difficulty of demonstrating an anticompetitive effect in a tied-product market resulting from a tying arrangement, and because such an effect is presumed to occur as a result of such arrangements when the seller has economic power in the tying market, actual proof of anticompetitive effect is not necessary. *Id.* at 9-10, 15-16. Instead, the law presumes an anticompetitive effect upon proof that the seller's economic power in the tying market enables it to restrain competition in the tied product. *Id.*[2] This presumption of illegality is known as the per se rule.

The only significant difference when applying the per se standard in an antitrust tying case as opposed to a non-tying case is that the defendant is permitted to offer business justifications for undertaking the tie. *See, e.g., Betaseed, Inc. v. U. & I Inc.*, 681 F.2d 1203, 1215 (9th Cir. 1982).

C. The Fifth Circuit Failed to Apply Correctly the Applicable Standard

Despite the clarity of the precedents to which it was bound, the Fifth Circuit Court of Appeals in *Hollymatic* instead was guided by a minority concurring opinion from *Jefferson Parish*. *See* Petitioner Taylor's Appendix 1 ("Appendix") at 6-7.[3] The concurring opinion in *Jefferson*

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[2] *But see NCAA v. Board of Regents*, 468 U.S. 85, 104 n.26 (1984) (certain tying arrangements may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis).

[3] The court of appeals did not address the sufficiency of the evidence presented in the lower court that demonstrated a tie between the Hollymatic machinery and the patty paper. The court of appeals instead assumed that a tie existed, but reversed the jury

Parish advocated the abolition of the per se rule of illegality in tying cases in favor of the Rule of Reason. *Jefferson Parish*, 466 U.S. at 35. The Rule of Reason requires a court to determine whether the actual anticompetitive effect upon the market for the tied product outweighs any pro-competitive effects. *Id.* This standard was rejected by the majority in *Jefferson Parish*, which reaffirmed the per se rule for tying arrangements. *Id.* at 9-10, 15-16.[4]

The court of appeals' reliance on the concurring opinion in *Jefferson Parish* eviscerates the presumption afforded to plaintiffs in per se tying cases, and places an unreasonable burden of proving anticompetitive effect upon the dealer plaintiff that conflicts with the legislative objectives of these statutes and previous case requirements.

Most disturbing, however, is that the Fifth Circuit Court of Appeals not only required proof of anticompetitive effect in *Hollymatic*, but also expected the dealer plaintiff to prove competitive injury to the "ultimate con-

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verdict in favor of Taylor because the court found that Taylor failed to prove that the tie was illegal, *i.e.*, that it had an anticompetitive effect upon consumers. *See* Appendix at 5.

[4] A minority of the circuit courts of appeal have required the plaintiff to show an anticompetitive effect in the market for the tied product. *Compare Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56-57 (2d Cir. 1980); *Bob Maxfield, Inc. v. American Motors Corp.*, 637 F.2d 1033, 1037 (5th Cir.), *cert. denied*, 454 U.S. 860 (1981); *Betaseed, Inc. v. U & I Inc.*, 681 F.2d 1203, 1215 (9th Cir. 1982) *with Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 718 (7th Cir. 1987) (noting that requirement of potential market power in tied product has not been endorsed by Supreme Court); *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1503 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986) (proof of anticompetitive effect only required where tying arrangement not shown to be illegal per se). This conflict in the standard being applied to a federal statute by a significant minority of the courts of appeal further compels clarification of the standard by this Court.

sumer." The court stated that the per se rule should not be applied where the anticompetitive effect of the tie was at the dealer level as long as end-users were able to obtain a product equivalent to the tied product from other sellers who were not subject to the tying arrangement. Appendix at 9-10. The court failed to consider, however, the practical economic effects of imperfect competition at the dealer level.[5]

For example, the court failed to consider that the increase in prices of the dealer's tied products resulting from the tying arrangement might permit other competitors to raise their prices to an artificially high level as a result of the lack of vigorous competition from the dealer.[6] The possibility of this result was acknowledged previously by this Court in response to a similar argument made by a defendant manufacturer. *See Kodak*, 119 L.Ed.2d at 288 n.21.

The court also failed to consider certain externalities that impact an end-user's decision to purchase the tied product from the dealer. Despite the availability of lower prices from competitors, dealers in Taylor's position are foreclosed from offering the tied product at a lower cost because of the tying arrangement. As a result, end-users

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[5] Under this standard a tied dealer might never recover under the antitrust laws. Injury to the dealer generally will occur if the dealer could otherwise have purchased the equivalent of the tied product from another seller at a lower price. But if the lower-priced product would otherwise be available to the dealer subject to the tie, it should also be available through other channels to the end-user. The *Hollymatic* court has stated that a dealer can only succeed in its action when the tying arrangement totally forecloses the ability of a consumer to obtain the product at a non-tied price.

[6] Moreover, where market imperfections exist, purchasers may not be fully sensitive to the price or quality implications of a tying arrangement, further impeding competition on the merits. *Jefferson Parish*, 466 U.S. at 15 n.24.

who desire consistency, continuity or convenience through the use of one dealer to obtain equipment, related supplies, and repair services, are forced to absorb the higher costs for the tied product that are passed-on by the dealer. *See, e.g., Kodak*, 119 L.Ed.2d at 288-89.

Economic reality and the logic of the precedents and arguments above strongly suggest that anticompetitive transactions occurring at any level of the chain of distribution have a ripple effect throughout the remainder of the market. Therefore, it is almost inevitable that, for example, Hollymatic's supercompetitive prices for the tied product affected the ultimate consumers of the tied product by enabling other sellers to raise their prices.

The *Hollymatic* case is a perfect example of the type of arrangement that is disfavored under the antitrust laws —an arrangement in which the seller forces, through exploitation of its leverage in the tying market, the purchase of its tied product in order to extend its influence into the tied market through other than competitive means. *See Jefferson Parish*, 466 U.S. at 36 (O'Connor, J. concurring). Application of the per se rule of illegality is entirely appropriate in such cases, and the Fifth Circuit Court of Appeals' failure to apply the per se rule clearly is erroneous.

II. THE COURT OF APPEALS ERRED BECAUSE THE PRACTICAL EFFECT OF ITS DECISION IS THAT THE FEDERAL ANTITRUST LAWS WILL PROTECT ONLY END-USERS AGAINST TIE-INS

The court of appeals stated that "(t)ies that constrain only dealers, like the one Taylor complains of, create relatively little danger to competition, provided consumers may purchase the goods separately. Appendix at 9 (footnotes omitted). Because the court reasoned that a restraint on a dealer does not threaten competition to the same extent as those that bind ultimate consumers, the

court failed to consider the injurious impact of the tie upon Taylor and other Hollymatic dealers.[7] The court's unduly narrow view of competitive injury is in direct conflict with four decades of private antitrust enforcement in which dealers and franchisees have successfully obtained antitrust remedies where tie-ins resulted in overcharges through the elimination of competition for the tied product.

The Supreme Court has stated:

> The antitrust laws "[do] not confine [their] protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The [laws are] comprehensive in [their] terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (referring to the Sherman Act). The Supreme Court has stated further that the courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those [antitrust] laws." *Radovich v. National Football League*, 352 U.S. 445, 454 (1977).

Previous decisions of this Court and lower courts indicate that dealers are protected with the same vigor as end-users under the antitrust laws. *See, e.g., Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (vertically imposed price restraint operating upon a single dealer could cause injury, and the dealer could recover for lost profits). Such a

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[7] A significant fallacy entertained by the court of appeals is that a clear distinction can always be made between a "dealer" and an "ultimate consumer" under the antitrust laws. This Court need look no further than its most recent tying case to witness the complexity of present-day relationships between manufacturers, dealers and consumers, which in many cases demonstrate that a dealer actually is a consumer in certain situations. *See, e.g., Kodak*, 119 L.Ed.2d 265 (entity was dealer for service but consumer for parts).

rationale is consistent with the Supreme Court's pronouncements that proof of public injury, *i.e.*, injury to a broad spectrum of end-users, is not required for a private plaintiff to successfully assert a per se violation of the antitrust laws. *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832, 841 (4th Cir. 1961).

Even more instructive on this issue is the legislative history of the antitrust laws. For example, the House Report on the Clayton Act stated:

> When we consider contracts of sales made under this system [a tying arrangement], the result to the consumer, the general public, *and the local dealer and his business* are even worse than under the lease system.

HR Rep. No. 627, 63d Cong., 2d Sess., 12-13 (1914) (emphasis added). Similarly, Representative Mitchell stated:

> No situation cries more urgently for relief than does this situation, and this bill seeks to prevent exclusive "tying" contracts that have brought about a monopoly, *alike injurious to the small dealers,* to the manufacturers, and grossly unfair to those who seek to enter the field of competition and to the millions of consumers.

51 Cong. Rec. 9090 (1914) (emphasis added).

These authorities indicate that the Fifth Circuit Court of Appeals was incorrect when it focused solely on the impact of a tying arrangement on the "ultimate consumer," without consideration of the injury to the dealer itself. Dealers have the right to seek remedies under the antitrust laws to the same extent as end-users, and to have the standards previously enunciated by this Court applied to their cases.

CONCLUSION

For the foregoing reasons, your amicus respectfully urges this Court to grant the Petition for Certiorari and ultimately to reverse the decision below.

Respectfully submitted,

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